NO. 48543-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION RWO

STATE OF WASHINGTON,

Respondent,

v.

ISAAC QUITIQUIT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Melissa Hemstreet, Judge

REPLY BRIEF OF APPELLANT

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A ARGUMENTS IN REPLY

1. THIS COURT SHOULD ACCEPT THE STATE'S CONCESSION OR ERROR.

On appeal, Quitiquit argues the sentencing court erred by imposing combined terms of incarceration and community custody that exceed the statutory maximum for his crime of conviction. Brief of Appellant at 13-15. In response, the State concedes this error and urges this Court to remand for resentencing. This Court should accept the State's concession of error as it is warranted in light of the applicable statutes under Chapter 9.94A RCW.

2. QUITIQUIT'S CLAIM HIS JURY WAS NOT PROPERLY INSTRUCTED IMPLICATES A FUNDAMENTAL CONSTITUTIONAL RIGHT FOR WHICH THERE IS A PLAUSIBLE SHOWING OF ACTUAL PREJUDICE AND THEREFORE MAY BE RAISED FOR THE FIRST TIME ON APPEAL.

On appeal Quitiquit seeks reversal of his convictions based on the trial court's failure to properly instruct his jury on how to reach constitutionally valid unanimous verdicts. BOA at 3-13. In response, the State urges this Court to refuse to consider the issue because it does not involve manifest constitutional error. Brief of Respondent (BOR) at 3-6. The State is wrong, and the position it takes is in direct conflict with the Washington Supreme Court's decision in State v. Lamar, 180 Wn.2d 576,

327 P.3d 46 (2014). Lamar controls and this Court should therefore reject the State's argument.

The State correctly notes that Lamar involved the trial court's failure to instruct the jury to begin deliberations anew when an alternate juror replaced one of the sitting jurors during deliberations. BOR at 4-5. But the State then makes the error of limiting the legal rule expressed in Lamar to that specific factual scenario. Id. Nothing in Lamar warrants such a limitation. The decision provides insightful discussion about the general concept of constitutional jury unanimity, and, like many other courts, recites the following as a proper rule of law:

> "The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them. It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11. Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint."

Lamar, 180 Wn.2d at 585 (quoting People v. Collins, 17 Cal.3d 687, 693, 552 P.2d 742 (1976)) (emphasis added).

And although this particular issue has historically been raised in the context of reconstituted juries, as in Lamar, such juries are not the only

ones that must be informed how to properly deliberate, all juries should be. The attempt to limit Lamar to its facts should be rejected.

In the same vein, the State claims Quitiquit failed to show he was prejudiced by the failure to properly instruct the jury and therefore may not be raised for the first time on appeal. BOR at 5-6. This also conflicts with Lamar. There, the Court noted;

> For a claim of error to qualify as a claim of manifest error affecting a constitutional right, the defendant must identify the constitutional error and show that it actually affected his or her rights at trial. The defendant must make a plausible showing that the error resulted in actual prejudice, which means that the claimed error had practical and identifiable consequences in the trial. State v. Davis, 175 Wn.2d 287, 344, 290 P.3d 43 (2012); State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011); State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). "[T]o determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error." O'Hara, 167 Wn.2d at 100. "If the trial court could not have foreseen the potential error or the record on appeal does not contain sufficient facts to review the claim, the alleged error is not manifest." Davis, 175 Wn.2d at 344.

Lamar, 180 Wn.2d at 583.

Quitiquit met this standard. As already noted, despite a recommendation from the WPIC Committee to give WPIC 4.61 at every recess, it was never given to Quitiquit's jury. Thus, they were never told not to deliberate during recesses, even after they began deliberations.

Nothing informed them that if one juror needed to use the bathroom, all of them had to stop discussing the case. It is thus eminently plausible that less than all 12 of Quitiquit's jurors were discussing the case during their deliberations. Moreover, in light of the extensive recommendations from the WPIC Committee to ensure jurors are instructed by the courts to limit deliberations to the jury room, Quitiquit's trial judge could and should have foreseen the potential error, and moved to correct it. This did not happen, and therefore under Lamar, Quitiquit may make this challenge for the first time on appeal.

Thereafter, the burden shifts to the State to prove the constitutional error was harmless beyond a reasonable doubt. Lamar, 180 Wn.2d at 588. The State cannot meet its burden in this regard. Remand for a new trial is warranted.

B. CONCLUSION

For the reason stated here and in the opening brief, Quitiquit requests this Court to reverse and remand for a new trial, or in the alternative, reverse and remand for resentencing.

Dated this 18th day of November, 2016

Respectfully submitted

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